



**UNITED STATES DEPARTMENT OF COMMERCE
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SERIAL NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTORNEY DOCKET NO.
07/580,778	09/11/90	BARCLAY	W 2391-1

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EXAMINER	
GECKLE, C	
ART UNIT	PAPER NUMBER
188	13

DATE MAILED:

09/30/91

Below is a communication from the EXAMINER in charge of this application
COMMISSIONER OF PATENTS AND TRADEMARKS

ADVISORY ACTION

☒ **THE PERIOD FOR RESPONSE:**

- ☐ is extended to run _____ from the date of the Final Rejection
- ☐ continues to run _____ from the date of the Final Rejection

☒ expires three months from the date of the final rejection or as of the mailing date of this Advisory Action, whichever is later. In no event however, will the statutory period for response expire later than six months from the date of the final rejection.

Any extension of time must be obtained by filing a petition under 37 CFR 1.136(a), the proposed response and the appropriate fee. The date on which the response, the petition, and the fee have been filed is the date of the response and also the date for the purposes of determining the period of extension and the corresponding amount of the fee. Any extension fee pursuant to 37 CFR 1.17 will be calculated from the date that the shortened statutory period for response expires as set forth above.

☐ Appellant's Brief is due in accordance with 37 CFR 1.192(a).

☒ Applicant's response to the final rejection, filed 9/20/91, has been considered with the following affect, but it is not deemed to place the application in condition for allowance:

1. ☒ The proposed amendments to the claim and/or specification will not be entered and the final rejection stands because:

- a. ☐ There is no convincing showing under 37 CFR 1.116(b) why the proposed amendment is necessary and was not earlier presented.
- b. ☒ They raise new issues that would require further consideration and/or search. (See Note).
- c. ☐ They raise the issue of new matter. (See Note).
- d. ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal.
- e. ☐ They present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE:

See Attachment

2. ☐ Newly proposed or amended claims _____ would be allowed if submitted in a separately filed amendment cancelling the non-allowable claims.

3. ☒ Upon the filing of an appeal, the proposed amendment ☐ will be ☒ will not be, entered and the status of the claims in this application would be as follows:

Allowed claims: none

Claims objected to: none

Claims rejected: 1-4, 6-8 & 33-64

However;

- a. ☐ The rejection of claims _____ on references is deemed to be overcome by applicant's response.
- b. ☐ The rejection of claims _____ on non-reference grounds only is deemed to be overcome by applicant's response.

4. ☒ The affidavit, exhibit or request for reconsideration has been considered but does not overcome the rejection.

5. ☐ The affidavit or exhibit will not be considered because applicant has not shown good and sufficient reasons why it was not earlier presented.

☐ The proposed drawing correction ☐ has ☐ has not been approved by the examiner.

☐ Other

The proposed amendments will not be entered since they raise new issues with regard to the requirements of 35 USC 112, first and second paragraph, which would require further search and consideration. Note for example the amendment to claim 7 as it depends on claim 1 refers to the "degree of cell rupture" yet there is no requirement for the microorganism to be present in the food product. Similarly the phrase "help prevent oxygen from readily reaching" in claim 53 is indefinite as to meaning and intent. The modifications to claims 54 and 55 are also indefinite since "less than" is not the equivalent of "up to". The proposed claims 65 adds a new larger grouping of microorganisms which would require further search and consideration.

With regard to the arguments concerning the rejections of record, the arguments have been carefully considered but not found totally persuasive. The arguments concerning the rejection based upon the Long reference are found persuasive and are hereby withdrawn. However all other rejections remain applicable for reasons of record.

Applicant alleges criticality with regard to the source of the omega fatty acid. yet the evidence of record is not persuasive of any difference in the so called food product containing the fatty acid from the specification mentioned microorganism and those of record. It is deemed particularly relevant that the claims do not require the presence of the microorganism in the food product.

Applicant has failed to explain how his food product which is

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said to contain a fatty acid extract from a particular source would be different from the art recognized food products having the same type of fatty acids present. That applicant's claim designated organism may yield higher yields of the fatty acid under certain conditions. However these limitations are not clearly reflected in the claims presented.

Further it is noted that while the culture techniques may be critical for specific strains of the microorganism, there is no evidence that these results would occur across the whole order of the microorganism.

For these reasons, the rejections are deemed proper and are adhered to.

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ART UNIT 188